

CHONG (Migration) [2018] AATA 1071 (23 March 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr KA LUNG CHONG
CASE NUMBER:	1611335
DIBP REFERENCE(S):	BCC2015/1175403
MEMBER:	Russell Matheson
DATE:	23 March 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211 of Schedule 2 to the Regulations; and • cl.820.221 of Schedule 2 to the Regulations.

Statement made on 23 March 2018 at 9:32am

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – Whether the applicant is in a genuine spousal relationship with the sponsor – Shared financial resources – Joint household responsibilities – Strong degree of emotional support

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15A(3), Schedule 2, cls 820.211(2)(a), 820.221

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 4 July 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant is a 29 year old male national of China. He applied for the visa on 21 April 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied that the applicant was the spouse of the sponsor. The applicant seeks review of the delegate's decision.
4. The applicant appeared before the Tribunal on 12 December 2017 to give evidence and present arguments. The Tribunal also received oral evidence from two witnesses. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
5. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
7. The Tribunal has before it the Department's file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant to the Tribunal.
8. The evidence the parties provided at the Tribunal hearing is recorded throughout this decision record.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

9. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties'

household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided the Tribunal a copy of the marriage certificate indicating that the parties were married in Hong Kong at the City Hall marriage Registry on 13 February 2014. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

12. In forming an opinion whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsors household and their commitment to each other as set out in r.1.15A(3).
13. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
14. The Tribunal had the benefit of the applicant's, the sponsor's and two witnesses' oral evidence at the hearing and found their evidence overall to be credible. The Tribunal gave all the evidence provided by the parties and witnesses' at the Tribunal hearing and evidence provided to the Department in the primary application and Tribunal file due regard.
15. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the parties were credible witnesses.
16. **Financial aspects**
17. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
18. The parties stated that they have a St. George joint account which is utilised to pay the utility bills and council rates. The applicant said that the sponsor had her own personal David Jones account and he had a card linked to that account. The parties stated that the David Jones account is utilised for the couple's mortgage payments and was also used as a savings account for their wedding. The applicant stated that he works as a cabinet maker and earns approximately \$1500 a week but also gets paid sometimes in cash for extra work performed. The sponsor said that she is a full time mother and the applicant pays for their daily living expenses with the extra cash he earns. The applicant stated that the mortgage for their property in Miranda is in the sponsors name only because of the current situation regarding his visa application. The sponsor stated that she wished to return to the workforce

or start her own business selling children's clothes so she can make a financial contribution to the relationship. The applicant's evidence is that he supported the sponsor financially and paid for daily living expenses when the couple were living together after their marriage with applicant's family in China. The Tribunal is satisfied the applicant supported the sponsor and shared financial resources at the time of his visa application.

19. There is no evidence before the Tribunal that the parties have any joint ownership of real estate, major assets, joint liabilities or any one person in the relationship owes any legal obligation in respect of the other. The Tribunal accepts that the applicant is servicing the mortgage in the sponsor's name.
20. The parties had a sound knowledge and presented detailed and consistent evidence of their financial affairs including, income, mortgage payments, their joint account, the daily living expenses and payment of utility bills, phone bills and council rates. The Tribunal is satisfied that the applicant supports the sponsor financially and there is preparedness of the parties to pool their financial resources and share the day to day household expenses.

21. Nature of the household

22. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements and daily routine of the parties and the sharing of the responsibility for housework and whether the parties are living together permanently in a partner relationship.
23. The couple provided evidence that they are living together in Miranda. There is a mortgage attached to their current address. They provided detailed and consistent evidence of their employment, living arrangements, and household responsibilities, purchasing household items and their daily routine and activities. They also provided as evidence numerous documents in individual and joint names showing that they reside together. The parties stated that they had notified government agencies that they were in a spousal relationship.
24. The parties stated that they registered their marriage on 13 February 2014 in Hong Kong and lived with applicant's parents after marrying sharing the household duties and responsibilities. The parties' evidence is that they established a joint household at Lyle Avenue Hurstville before purchasing a house in Montgomery Street Miranda. Although there is limited evidence presented by the parties of cohabitation at Hurstville the Tribunal accepts that they established a joint household together at the time of the visa application.
25. The parties have a son Lawrence born to their relationship on 25 March 2016 and they love, care and support the child's growth and development together.
26. The Tribunal accepts that the parties live together and that they have established a joint household. The Tribunal accepts that they share the responsibility of the household duties and the care and support their child.

27. Social aspects

28. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, recognition and the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
29. The Tribunal accepts that the relationship is socially recognised by family and friends. There are limited statements from third parties, including close family members, who express their view that the relationship is a genuine one. The couple presented photographic evidence of

their wedding ceremony and various family and social events that they attended together along with family pictures with their son in a home environment. The parties stated that they have a small circle of friends that they socialise with and that the applicant loves to go fishing on weekends. The parties said that life is quite simple at present and they stay at home quite often as a family enjoying each other's company and caring for their young son. The couple stated that they have travelled on holiday together overseas to Japan, Thailand the Maldives and the Republic of Palau. The parties stated that have travelled extensively together with their son as a family unit on daily outings to Port Stephens, the Hunter Valley and the Opera House in Sydney.

30. The parties' evidence is that they have known each other through their parents' relationship as school friends. They stated that they dined together on a regular basis between 2012 and 2014 and their relationship developed as boyfriend and girlfriend before marrying in February 2014. They stated that they have lived together with the applicants parents immediately after their wedding in China and now have a child born to the relationship and have purchased a new home together in Australia.
31. The Tribunal is satisfied they plan and undertake joint social activities and represent themselves to others as being in a genuine and continuing relationship. The Tribunal accepts that the parties' family and friends accept that they are living in a genuine and continuing relationship at the time of application and decision.

32. Commitment

33. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
34. The parties claim that their parents went to primary school together and remained in contact after their school years. The applicant states that met at each other's family homes for dinner on occasions from December 2012 and a relationship developed over the coming months and that the relationship was supported by both sets of parents. The parties claim to have entered into a committed relationship from September 2013. The applicant states that he proposed to the sponsor over dinner at a restaurant in February 2014 and they were married in a civil ceremony in Jinjiang City on 13 February 2014. The parties said that they had a wedding ceremony in their hometown on 19 September 2014 and had a honeymoon in October 2014 in the Maldives. To date, the relationship has lasted for a period exceeding five years.
35. The parties have a child born to their relationship on the 25 March 2016 and have purchased a house together in 2015. The Tribunal accepts the mortgage is in the sponsors name because of the applicant's present status and visa arrangements. The applicant is presently the sole income earner and is and meeting the mortgage payments. The applicant is financially supporting the sponsor and their child. The applicant said that he wants to become a sole trader and have his own cabinet making business. The sponsor that she would also like to operate her own children's clothing business. The parties said that they are planning a family holiday with their parents to Bali and Hong Kong in the not too distant future. The parties said they love, support and care for each other and their child. The sponsor said that the applicant [information removed] and they support each other emotionally through the growth and development of their child. The parties said that they were considering having another child and were focussed on their financial security into the future. The applicant stated that he has made the sponsor and his son the beneficiary of his life insurance policy.

36. The party's evidence is that they have been in a long term and committed relationship since 2013 and have cohabitated together since marrying in February 2014. Their evidence is that they have maintained that relationship to the present time residing together in China and Hurstville prior to lodging the visa application. They have a young child born to their relationship and are living together in their residence in the suburb of Miranda. The Tribunal is satisfied that the applicant and sponsor were in a genuine and continuing relationship at the time of application.
37. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests and expectations. The Tribunal is satisfied the parties provided each other a strong degree of companionship and emotional support that is commensurate with a couple being in a spousal relationship. The Tribunal is satisfied the couple view their relationship as a long term one.

38. Findings

39. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied they live together and not separately and apart on a permanent basis. Having considered all the evidence and circumstances of the relationship as detailed above, the Tribunal is satisfied the parties were in a spousal relationship at time of application.
40. The Tribunal is satisfied that the sponsor is not prohibited from being a sponsoring partner and continues to sponsor the applicant. The Tribunal is satisfied that the sponsor, at the time of the visa application and decision was an Australian citizen who had turned 18.
41. The applicant's movement records evidence him having been the holder of a business visitor (subclass UD-601) visa at the time of application. He held this substantive visa upon applying for the Partner (Temporary) (Class UK) subclass 820 visa on 21 April 2015. As the applicant held a substantive visa at the time of application, further requirements in cl.820.211(2)(d) need not be met.
42. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
43. Therefore the applicant meets cl.820.211(2) and cl.820.221(1)(a).
44. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

45. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.
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Russell Matheson
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).